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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

17 JACK PERLMUTTER, individually and on) No. 5:10-cv-03451-LHK
behalf of all others similarly situated,)
18 Plaintiffs,) CLASS ACTION
19 vs.) NOTICE OF MOTION AND MOTION BY
20 INTUITIVE SURGICAL, INC., BENJAMIN) MICHAEL D. MARCUS FOR
GONG, ALEKS CUKIC, JEROME) APPOINTMENT OF LEAD PLAINTIFF
McNAMARA, MARK J. RUBASH, GARY) AND APPROVAL OF SELECTION OF
GUTHART, MARSHALL MOHR, and) COUNSEL; MEMORANDUM OF POINTS
LONNIE SMITH,) AND AUTHORITIES IN SUPPORT
21) THEREOF
22) DATE: December 9, 2010
23 Defendants.) TIME: 1:30 p.m.
24) CTRM: 4

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NOTICE OF MOTION AND MOTION

2 TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD
3
4 PLEASE TAKE NOTICE that on December 9, 2010, at 1:30 p.m., or as soon thereafter as
5 the matter may be heard in Courtroom 4 of the Honorable Lucy H. Koh, Michael D. Marcus (“Mr.
6 Marcus” or “Movant”) will and hereby does move this Court pursuant to the Private Securities
7 Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. §78u-4(a)(3)(B), for an order: (1) appointing
8 Mr. Marcus as Lead Plaintiff, and (2) approving Lead Plaintiff’s selection of Brower Piven, A
9 Professional Corporation (“Brower Piven”) as Lead Counsel and Schubert Jonckheer & Kolbe LLP
10 (“Schubert Firm”) as Liaison Counsel for the Class. This Motion is made on the grounds that Mr.
11 Marcus is the “most adequate plaintiff.” In support of this Motion, Mr. Marcus submits herewith a
12 Memorandum of Points and Authorities and the Declaration of Willem F. Jonckheer (“Jonckheer
Decl.”).

MEMORANDUM OF POINTS AND AUTHORITIES

14 || I. STATEMENT OF ISSUES TO BE DECIDED

Presently pending in this Court is the above-captioned securities class action (the “Action”) brought on behalf of all persons who purchased or otherwise acquired the publicly-traded securities of Intuitive Surgical, Inc. (“Intuitive” or the “Company”) between February 1, 2008 and January 7, 2009, inclusive (the “Class Period”). The Action asserts claims pursuant to the Securities Exchange Act of 1934 (“Exchange Act”) on behalf of purchasers of Intuitive’s publicly-traded securities during the Class Period (the “Class”).

21 This Action is brought pursuant to §§10(b) and 20(a) of the Exchange Act and Securities and
22 Exchange Commission (“SEC”) Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5. The
23 Court is to appoint as lead plaintiff the member of the purported Class with the largest financial
24 interest in the relief sought by the Class that otherwise satisfies the requirements of Rule 23 of the
25 Federal Rules of Civil Procedure. 15 U.S.C. §78u-4(a)(3)(B). Here, Mr. Marcus should be
26 appointed as Lead Plaintiff because he: (1) timely filed his motion for appointment as Lead Plaintiff;
27 (2) has the largest financial interest in the outcome of this litigation of any person or group of

1 persons of which he is aware; and (3) will adequately represent the interests of the Class. *See* 15
 2 U.S.C. §78u-4(a)(3)(B)(iii); *see also* Jonckheer Decl., Ex. A.

3 In addition, Mr. Marcus's selection of Brower Piven to serve as Lead Counsel and the
 4 Schubert Firm as Liaison Counsel should be approved because they possess extensive experience in
 5 the prosecution of securities class actions and will adequately represent the interests of all Class
 6 members.

7 **II. SUMMARY OF THE ACTION¹**

8 During the Class Period, defendants claimed that the "perceived advantages" of the da Vinci
 9 robot (a robotic surgical device that is Intuitive's key product) for prostate operations were causing
 10 increasing demand for a da Vinci operation over a traditional human-controlled operation.
 11 According to defendants, this increased demand for da Vinci robots would cause hospitals to buy
 12 even more of the Company's surgical products from which defendants would reap increasing
 13 annuity-like revenue because each robotic procedure required the hospital to use the Company's
 14 related products and services.

15 Prior to the Class Period, defendants had managed their earnings so as to miraculously beat
 16 analyst expectations 23 quarters in a row. In truth, a majority of the Company's potential clients had
 17 already purchased a da Vinci. Thus, defendants' aggressive growth (unbeknownst to shareholders)
 18 had come to an end prior to the beginning of the Class Period and defendants were well aware of this
 19 fact. by January 2008 (prior to the beginning of the Class Period), Intuitive's New System Sales
 20 departments were suffering catastrophic setbacks. Specifically, Intuitive's key clients, including the
 21 very hospitals which defendants had previously depended upon for sales, were cutting capital
 22 expenditures in the face of rising interest rates, tight credit markets, recession, rising deductibles, and
 23 inflationary fears. Despite this reality, defendants maintained a broad-based denial of the
 24 Company's true prospects. In fact, defendants claimed that Intuitive was essentially recession-proof

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 26 _____
 27 ¹ This factual summary is taken from the allegations in the Class Action Complaint for
 28 Violation of Federal Securities Laws filed in this Action on August 6, 2010.

1 as the purchase of its machines was of the highest priority on its existing hospitals' capital
 2 expenditure budgets, and that the purchase of the da Vinci robots was considered necessary
 3 regardless of the cost. Defendants knew or consciously disregarded that since January 2008, 77% of
 4 hospitals had reduced capital spending, and 54% of hospitals had stopped future project spending
 5 altogether, which left most hospitals in no position to even contemplate the purchase of a da Vinci.

6 Defendants' own individual futures with the Company also would have been on dire footing
 7 if the truth about the Company was not kept hidden, especially as the Company shareholder meeting
 8 held in April 2008 was already in the pre-planning stages by January of that year, the
 9 commencement of the Class Period. Accordingly, keeping the truth from the shareholders was key
 10 if defendants were to justify the seven-figure bonuses and awards they had successfully extracted
 11 from the Company, which totaled in excess of \$6.7 million, and if they were to continue to receive
 12 such exorbitant compensation going forward. Defendants also awarded themselves with severance
 13 agreements in the weeks prior to the beginning of the Class Period, so they would all have multi-
 14 million dollar golden parachutes should they be fired once anyone acquired the Company and
 15 unearthed defendants' misdeeds.

16 In July 2008, when Intuitive reported its financial results for Q2 2008, the defendants knew
 17 that the large scale medical sales they enjoyed in 2007 had come to an end. Nonetheless, defendants
 18 actually raised the Company's guidance for future quarters. In response to the Company's Q2 2008
 19 report and projections, shares of the Company rose 18% to as high as \$331. Defendants took
 20 advantage of this renewed artificial inflation of Intuitive's stock price and sold over \$5 million of
 21 their holdings immediately thereafter.

22 Through Intuitive's Q2 2008 report, defendants succeeded in convincing the market of its
 23 unstoppable growth. At the same time, defendants promoted their favored analysts on the
 24 Company's own website, complete with the names of the analysts, the firm for whom they worked,
 25 and even the analysts' individual email addresses. In turn, these analysts boosted their price targets
 26 for the Company's stock. Analysts became even more bullish in response to defendants' continued
 27 false claims.

28

1 Bogus projections were but one of the means defendants used to inflate the stock price. To
 2 further support these projections and the appearance of growth, Intuitive stated in its 2007 Form 10-
 3 K, filed with the SEC on February 14, 2008, that the Company had recently entered into an
 4 agreement to purchase 7 acres of property adjacent to its headquarters in Sunnyvale, California,
 5 where they reportedly intended to build a new 154,000 square foot manufacturing and engineering
 6 building, in order to meet increased demand for the Company's products. In fact, demand for
 7 Intuitive's new systems was so poor that internally defendants had no plans to begin developing
 8 these facilities until 2010 at the earliest.

9 Most customers who could afford and who wanted Intuitive's da Vinci systems had bought
 10 them in previous quarters. The market for the systems had gotten to the point where demand was so
 11 lacking that defendants were forced to discount the price of the da Vincis and/or even sell deeply
 12 discounted "used" da Vincis, and even with these inducements, the defendants could not continue to
 13 post the record growth they projected that the Company had experienced prior to the Class Period.
 14 In 2008, demand from hospitals had dropped to the point where Intuitive was selling da Vincis to
 15 leasing companies, who in turn leased them to hospitals no longer interested in making such large-
 16 ticket purchases. Naturally, this "sales" practice remained undisclosed until 2009.

17 Despite the fact that the Company was facing the worst business environment in its history,
 18 defendants continued to project even more da Vinci system sales and increases in procedures
 19 involving the da Vincis in order to further inflate Intuitive's stock price. At investor meetings,
 20 executives sketched out the number of systems the market demanded. Unfortunately for
 21 shareholders, the projections were false. Privately, during a recession which was causing the share
 22 prices of companies similar to Intuitive to decline, defendants were attempting to pocket tens of
 23 millions of dollars through insider trading, together with bonuses and stock grants by inflating the
 24 Company's share value. Defendants claimed the basis for their outrageous bonuses and self-
 25 awarded grants was confidential and that providing the rationale for their internal grants to
 26 themselves would essentially give away their "trade secrets."

27 On January 7, 2009, the Company preannounced preliminary Q4 results that were below
 28

1 expectations. Subsequently, on January 22, 2009, the Company released its actual fourth quarter
 2 2008 sales numbers, revealing that Q4 2008 system sales were \$114 million - down from \$126
 3 million in Q3 2008. In response, the Company's share price dropped to a close of \$93.29 from its
 4 previous close of \$96.01, a drop of nearly \$250 per share, down from a 52-week high of \$353.88. In
 5 addition, several analysts downgraded the stock to a "hold" from a "buy recommendation."

6 **III. ARGUMENT**

7 **A. Mr. Marcus Satisfies the PSLRA's Requirements and Should Be
 8 Appointed Lead Plaintiff**

9 The PSLRA establishes the procedure for the appointment of a lead plaintiff in "each private
 10 action arising under [the Exchange Act] that is brought as a plaintiff class action pursuant to the
 11 Federal Rules of Civil Procedure." 15 U.S.C. §78u-4(a)(1); *see also* 15 U.S.C. §78u-4(a)(3)(B)(i).
 12 First, the pendency of the action must be publicized in a widely circulated national business-oriented
 13 publication or wire service not later than 20 days after filing of the first complaint. 15 U.S.C. §78u-
 14 4(a)(3)(A)(i). This notice shall advise members of the class of: (1) the pendency of the action; (2)
 15 the claims asserted therein; (3) the purported class period; and (4) the right to move the court to be
 16 appointed as lead plaintiff within 60 days of publication of the notice. Here, notice was published on
 17 August 9, 2010 on *Marketwire* in connection with the filing of the first-filed action. *See* Jonckheer
 18 Decl., Ex. C.

19 Next, the PSLRA provides that the court shall adopt a presumption that the most adequate
 20 plaintiff is the person or group of persons that –

- 21 (aa) has either filed the complaint or made a motion in response to a notice . . . ;
- 22 (bb) in the determination of the court, has the largest financial interest in the relief
 sought by the class; and
- 23 (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil
 Procedure.

24 15 U.S.C. §78u-4(a)(3)(B)(iii)(I); *see In re Cavanaugh*, 306 F.3d 726, 729-30 (9th Cir. 2002). Mr.
 25 Marcus meets each of these requirements and should therefore be appointed Lead Plaintiff.

1 **1. Mr. Marcus's Motion Is Timely**

2 Mr. Marcus has timely filed this Motion within 60 days of the August 9, 2010 notice
 3 publication, and has also duly signed and filed his certification evidencing, among other things, his
 4 willingness to serve as a representative party on behalf of the Class. *See* Jonckheer Decl., Ex. A.
 5 Accordingly, Mr. Marcus has satisfied the individual requirements of 15 U.S.C. §78u-4(a)(3)(B) and
 6 is entitled to have his application for appointment as Lead Plaintiff considered by the Court.

7 **2. Mr. Marcus Possesses the Largest Financial Interest in the
 Relief Sought by the Class**

8 According to 15 U.S.C. §78u-4(a)(3)(B)(iii), the Court shall appoint as lead plaintiff the
 9 movant or movants who have the largest financial interest in the relief sought by the action. *See*
 10 *Cavanaugh*, 306 F.3d at 732. As demonstrated herein, Mr. Marcus has actual Class Period losses of
 11 approximately \$3,077,757.66. *See* Jonckheer Decl., Exs. A and B. To the best of his knowledge,
 12 there are no other applicants who have sought, or are seeking, appointment as lead plaintiff that have
 13 a larger financial interest. Therefore, Mr. Marcus satisfies the PSLRA's prerequisite of having "the
 14 largest financial interest in the relief sought by the class." 15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(cc).

15 **3. Mr. Marcus Meets Rule 23's Requirements**

16 In addition to possessing a significant financial interest, a lead plaintiff must also "otherwise
 17 satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. §78u-
 18 4(a)(3)(B)(iii)(I)(cc). Rule 23(a) generally requires that the claims of representative parties be
 19 typical of the claims of the class and that the representatives will fairly and adequately protect the
 20 interests of the class. *See* Fed. R. Civ. P. 23; *Cavanaugh*, 306 F.3d at 730. As detailed below, Mr.
 21 Marcus satisfies the typicality and adequacy requirements of Rule 23(a).

22 The test of typicality "is whether other members have the same or similar injury, whether
 23 the action is based on conduct which is not unique to the named plaintiffs, and whether other class
 24 members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976
 25 F.2d 497, 508 (9th Cir. 1992) (citation omitted). The threshold typicality and commonality
 26 requirements are not high; Rule 23(a) requires only that resolution of the common questions affect
 27 all, or a substantial number of, class members. *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 657 (C.D.
 28

1 Cal. 2000). The adequacy requirement is met if no conflicts exist between the representative and
 2 class interests and the representative's attorneys are qualified, experienced and generally able to
 3 conduct the litigation. *Richardson v. TVIA, Inc.*, No. 06-06304, 2007 U.S. Dist. LEXIS 28406, at
 4 *16 (N.D. Cal. Apr. 16, 2007) (citation omitted).

5 Here, Mr. Marcus meets the typicality and adequacy requirements because, like all other
 6 members of the purported Class, he purchased Intuitive securities during the Class Period in reliance
 7 upon defendants' false and misleading statements and suffered damages thereby. Because Mr.
 8 Marcus's claims are premised on the same legal and remedial theories and are based on the same
 9 types of alleged misrepresentations and omissions as the Class's claims, typicality is satisfied. See
 10 *In re Surebeam Corp. Sec. Litig.*, No. 03-1721, 2003 U.S. Dist. LEXIS 25022 (S.D. Cal. Jan. 5,
 11 2004). Additionally, Mr. Marcus is not subject to any unique defenses and there is no evidence of
 12 any conflicts between Mr. Marcus and the other Class members. Therefore, Mr. Marcus satisfies the
 13 *prima facie* showing of the typicality and adequacy requirements of Rule 23 for purposes of this
 14 Motion.

15 **B. This Court Should Approve Mr. Marcus's Selection of Counsel**

16 The PSLRA vests authority in the lead plaintiff to select and retain lead counsel, subject to
 17 this Court's approval. See 15 U.S.C. §78u-4(a)(3)(B)(v). Courts should not disturb the lead
 18 plaintiff's choice of counsel unless it is necessary to "protect the interests of the class." 15 U.S.C.
 19 §78u-4(a)(3)(B)(iii)(II)(aa).

20 Here, Mr. Marcus has selected Brower Piven as Lead Counsel for the Class and the Schubert
 21 Firm as Liaison Counsel for the Class. Brower Piven and the Schubert Firm have not only
 22 prosecuted complex securities fraud actions, but have also successfully prosecuted many other types
 23 of complex class actions as lead and/or class counsel. See Jonckheer Decl., Ex. D & E. Thus, the
 24 Court may be assured that in the event this Motion is granted, the members of the Class will receive
 25 the highest caliber of legal representation available from Brower Piven as Lead Counsel and the
 26 Schubert Firm as Liaison Counsel. Because Mr. Marcus has selected and retained counsel
 27 experienced in litigating securities fraud class actions with the resources to prosecute this Action to
 28

1 the greatest recovery possible for the Class, his choice of Brower Piven as Lead Counsel and the
2 Schubert Firm as Liaison Counsel should be approved.

3 **IV. CONCLUSION**

4 For the foregoing reasons, Mr. Marcus respectfully requests that the Court: (1) appoint Mr.
5 Marcus as Lead Plaintiff; (2) approve Mr. Marcus's selection of Lead Counsel and Liaison Counsel
6 for the Class; and (3) grant such other and further relief as the Court may deem just and proper..

7 DATED: October 8, 2010

SCHUBERT JONCKHEER & KOLBE LLP

8 ROBERT C. SCHUBERT
9 WILLEM F. JONCKHEER

10
11 _____ /s/
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